



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

200 PORTLAND STREET  
BOSTON, MASSACHUSETTS 02114

TOM REILLY  
ATTORNEY GENERAL

(617) 727-2200  
<http://www.ago.state.ma.us>

July 31, 2003

Mary Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station  
Boston, Massachusetts 02110

**Re: Massachusetts Electric Company and Nantucket Electric Company, D.T.E.  
03-67**

Dear Secretary Cottrell:

On July 17, 2003, pursuant to a Department of Telecommunications and Energy ("Department") Order of Notice, the Attorney General filed comments concerning Massachusetts Electric Company and Nantucket Electric Company's (collectively "MECo" or "Company" or "National Grid") request that the Department approve a proposed amendment to two standard offer wholesale contracts executed on December 21, 1998, by Eastern Edison Company ("Eastern Edison"). MECo did not file a response to the Attorney General's comments until July 29, 2003. By this letter the Attorney General replies to the Company's July 29 filing.

In its July 29 filing, the Company concedes that "the Attorney General is correct that FERC has jurisdiction over the underlying agreements." MECo Response, p. 1. Based on this admission, the Department should dismiss the proposed contract amendments. The Federal Energy Regulatory Commission ("FERC"), not the Department, has jurisdiction over the proposed amendments.

Notwithstanding MECo's admission on subject matter jurisdiction, the Company now maintains that the Department must allow it to bill customers for an additional \$3.2 million/year in standard offer costs merely because the supplier may "file" the proposed amendments with FERC.<sup>1</sup> MECo Response, pp. 1-2. MECo argues that the Department must "pass on the

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<sup>1</sup> The Attorney General disputes MECo's position that all that FERC requires is that the contract amendments be filed to be effective. In a recent congestion related case at FERC, the Commission held that parties that seek to modify or abrogate a jurisdictional contract must make appropriate filings under FPA Sections 205 or 206 to change the contract, whether or not the contract itself has been physically filed. *Richard Blumenthal, Attorney General of the State of Connecticut, and The Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc.*, 103 FERC ¶ 61,344, 2003 WL 21480251, \*15 (June 25, 2003). The Commission stated that "parties who seek to overturn market-based

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underlying wholesale costs that it incurs. . . .” *Id.*, p. 1.

The Company attempts to confuse the jurisdictional issues in this case by equating a supply contract with a vendor as a filed rate under the Federal Power Act. MECo has many contractual arraignments with many vendors and whether those vendor costs are recoverable depends upon approval by the regulatory authority with jurisdiction. Merely because MECo incurs a cost does not mean it is recoverable. The “filed rate” in this case is not the vendor contracts that the Company seeks to modify, but rather the standard offer charges set forth in the FERC approved Montaup wholesale restructuring agreement. The fact that MECo has incurred vendor costs in order to comply with its wholesale restructuring obligations does not mean they are recoverable from customers without FERC modification of the existing filed rates.

The Montaup Restructuring Agreement, approved by FERC in Docket Nos. ER97-2800-000, ER97-3127-000 and ER97-2338-000, contains specific rates for the provision of standard offer service.<sup>2</sup> These prices “shall be for electricity delivered to the meter of Eastern’s ultimate customer” . . . and include “any and all transmission charges to reach Montaup’s system . . . .” Restructuring Agreement, D.T.E. 96-24, Volume 2, p. 15. “[A] utility subject to FERC jurisdiction “can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the [FERC], and not even a court can authorize commerce in the commodity on other terms. . . .” *Eastern Edison Company v. Department of Public Utilities*, 388 Mass. 292, 298-299 (1983). As the Massachusetts Supreme Judicial Court held, “*Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951), established that the FERC rate is the only legal rate “whether fixed or merely accepted by the [FERC].” *Id.* p. 304. The Department must reject MECo’s attempt to increase standard offer rates absent a FERC order modifying the standard offer prices in the Montaup Restructuring Agreement.”<sup>3</sup>

MECo’s second argument is not relevant to the issues in this case. See MECo Response, p. 2. The fact that the operation of the wholesale market changed and caused the Company to incur additional costs may have merit in a FERC proceeding in which the Company seeks to modify the “filed” rate, but is a legally insufficient basis for the Department to assert

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<sup>1</sup>(...continued)

contracts into which they voluntarily entered will bear a heavy burden.” *Id.* 2003 WL 21480251, \*16, citing *Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Mktg. L.P., et al.*, 99 FERC ¶ 61,047 at 61,190, reh’g order, *Nevada Power Company, et al. v. Morgan Stanley Capital Group, Inc.*, 100 FERC ¶ 61,273 (2002), See also *United Gas Pipeline Company v. Mobil Gas Service Corporation*, 350 U.S. 332 (1956) (*Mobil*); *Federal Power Commission v. Sierra Power Company*, 350 U.S. 348 (*Sierra*) (collectively *Mobil-Sierra*).

<sup>2</sup> \$0.47¢/kWh in 2003 and \$0.51¢/kWh in 2004

<sup>3</sup> MECo maintains that these costs are also recoverable as an Exogenous Factor pursuant to the merger settlement in D.T.E. 99-47. Those adjustments, however, apply only to distribution costs and rates, not standard offer costs or rates.

jurisdiction. Whether the incurrence of increased charges was foreseeable when the contracts were entered into is a question of fact for a FERC hearing. Finally, the Company objects to the Attorney General's request for a hearing. If the Department asserts jurisdiction over the contract amendments, it will in effect have reversed its decision in D.T.E. 97-105 which provided for FERC review of the contracts. Since the Department itself did not review the Eastern Edison wholesale standard offer contracts in that docket, G.L. c. 164, § 94A requires review now.

The Company again renews its request that the contract amendments be protected from public disclosure pursuant to G.L. c. 25, § 5D. However, since the Company now concedes that these contracts are within the jurisdiction of FERC, federal law, not state law, applies to confidentiality. By both regulation and decision, FERC has held that these type of contracts are **public documents** and are not entitled to confidential treatment as trade secrets, commercial or financial information obtained from a person, or privileged or confidential. *See Southern Company Services, Inc. et. al.*, 100 FERC P 61,328 (2002); *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043, FERC Stats. & Regs. p 31,127, reh'g denied, Order No. 2001-A, 100 FERC p 61,074 (2002). FERC believes that the long-standing public access to such agreements outweighs any potential harm to sellers of electricity at market-based rates under long-term contracts. FERC is concerned with fostering competition through transparency of rates and terms of service rather than protecting individual competitors. In fact, FERC Order No. 2001 specifically requires public utilities to publicly file contract data about wholesale power sales.<sup>4</sup> The Department too should reject MECo's request to make public documents confidential. The Department should not hide from public view MECo's attempt to avoid its obligations under the Restructuring Settlement Agreements. A policy of transparency of rates and the terms of service should prevail over secret amendments between a utility and its suppliers.

The Department should deny MECo's attempt to change jurisdiction over the standard offer contracts and impose \$3.2 million/year in additional costs on standard offer customers. In addition, the Department should deny confidential treatment for the contracts and the amendments.

Respectfully submitted,

TOM REILLY  
ATTORNEY GENERAL

By: Joseph W. Rogers  
Chief, Utilities Division

cc: Amy G. Rabinowitz, Esq.  
Service List

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<sup>4</sup> The Attorney General's non-disclosure agreement does not provide for confidential treatment of documents of public documents or those which must be publicly disclosed.